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No. 93-1753

In The
Supreme Court of the United States
October Term, 1993

CITY OF TIMBER LAKE, *et al.*,

Petitioners,

v.

CHEYENNE RIVER SIOUX TRIBE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari To the United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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36 pp

QUESTION PRESENTED

Whether this Court should revisit its ruling in *Rice v. Rehner*, 463 U.S. 713, 715 & n. 1 (1983), that under 18 U.S.C. §§ 1151, 1161, "Congress has delegated authority to the states ***as well as to the Indian tribes*** to regulate the use and distribution of alcoholic beverages in Indian country," even though Congress affirmed that construction within one year after *Rice* by amending § 1161 in other respects without changing its operative language?

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STATUTORY PROVISIONS

18 U.S.C. § 1151. **INDIAN COUNTRY DEFINED.**

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation. . . .

* * *

PUBLIC LAW NO. 83-277, Ch. 502, 67 Stat. 586, codified in part at 18 U.S.C. § 1161.

An Act to eliminate certain discriminatory legislation against Indians in the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1161. Application of Indian liquor laws."

Sec. 2. Title 18, United States Code, is hereby further amended by inserting in chapter 53 thereof immediately after section 1160 a new section, to be designated as section 1161, as follows: "§ 1161. Application of Indian liquor laws.

"The provisions of sections 1154, 1156, 3113, 3488, and 3618 of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided that such act or transaction is in conformity

with both the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the federal register.

Sec. 3. The consent of the United States is hereby given to repeal of the third and eleventh paragraphs of article 20 of the constitution of Arizona, and that part of section 1 of article 21 of the constitution of New Mexico relating to the sales of intoxicants to Indians, if the people of Arizona and New Mexico shall adopt constitutional amendments to accomplish such repeal.

Sec. 4. Section 9 of the Act of June 4, 1920, An Act to provide for the allotment of lands of the Crow Tribe, for the distribution of tribal funds, and for other purposes (41 Stat. 751), is hereby repealed.

STATEMENT OF THE CASE

The issue here is whether the Court should revisit its ruling in *Rice v. Rehner*, 463 U.S. 713, 715 (1983) that in 18 U.S.C. §§ 1151 and 1161, "Congress has delegated authority to the states as well as to the Indian tribes to regulate the use and distribution of alcoholic beverages in Indian country." Supreme Court review is unwarranted here, especially since Congress affirmed this Court's ruling in 1984, within one year after *Rice*, by amending § 1161 in other respects without changing the operative language construed by *Rice*.

A. BACKGROUND OF FEDERAL AND TRIBAL LIQUOR REGULATION

In 1986, Congress found that Indian tribal governments need to curb the devastating effects of alcohol abuse among Indians:

> alcoholism and alcohol and substance abuse among Indians is ***the most severe health and social problem facing Indian tribes and Indian people today*** and nothing is more costly to Indian people than the consequences of alcohol and substance abuse measured in physical, mental, social, and economic terms.

Indian Alcohol and Substance Abuse Prevention and Treatment Act, 25 U.S.C. § 2401 (emphasis added). Congress concluded, "Indian tribes have the primary responsibility for protecting and ensuring the well-being of their members," and directed federal agencies to assist tribes in their fight against alcohol abuse. *Id.*

The Surgeon General and other experts agree with Congress and urge tribal governments to enact proactive policies to curb alcohol abuse:

> Tribes need to strictly examine and change alcohol and social policies so that they influence new norms and guidelines of behavior regarding alcohol and substance use.... [A] new, more explicit set of policies is needed to guide behavior.

SURGEON GENERAL WORKSHOP ON DRUNK DRIVING: BACKGROUND PAPERS (1988) at 219.[1]

Congress has historically shown a strong interest in curbing alcohol abuse among Indians. Since 1834, Congress prohibited ***both***: "(1) the introduction of liquor into Indian country ***and*** (2) the [provision] of liquor ***anywhere in the United States*** [to] an Indian...." Pet.[2] 3; *see Rice* at 722 n. 8. Throughout the Nineteenth Century and the first half of the Twentieth Century, Congress furthered its policy of restricting liquor to Indians through treaty and statutory provisions. "As a condition of entry into the United States, Arizona, New Mexico, and Oklahoma were required by Congress to enact prohibitions against the sale of liquor to Indians and introduction of liquor into Indian country." *Rice* at 723.

After the Korean War, Arizona Indians saw the prohibition against sale of liquor to Indians as discriminatory, and asked their congressional delegation to lift the prohibition. Rep. Patten of Arizona introduced legislation on behalf of Arizona Indian tribes to remove prohibition "within Arizona," "outside

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1. The U.S. Dept. of Health and Human Services Office for Substance Abuse Prevention (OSAP) explains that: "Laws about [alcohol or drug] use have become more strict in response to the waves of AOD-related crimes and tragedies in America. Alcohol or other drugs have been found to be a factor in 50% of traffic fatalities, 62 % of assaults, 49% of murders, 52% of rapes, and 38% of child abuse cases." TURNING AWARENESS INTO ACTION: WHAT YOUR COMMUNITY CAN DO ABOUT DRUG USE IN AMERICA (1991) at 17. OSAP asks the public to check with their local governments to see if new regulations are being considered to fight alcohol abuse and to ensure compliance with regulatory laws by "local retailers, restaurants and entertainment businesses" that sell liquor. *Id.*

2. As used herein, "Pet." refers to the Petition for Writ of Certiorari, "A" refers to the Appendix to the Petition, "O.Ap." refers to respondents' Appendix to Appellants' Memorandum In Opposition To Motion For Stay Of Mandate, and "Tr." refers to transcripts of proceedings before the tribal superior court.

an Indian reservation" and to delegate authority to Indian tribes to regulate the use and distribution of liquor "within an Indian reservation." *See* H.R. 1055, 83rd Cong., 1st Sess.; 99 Cong. Rec. 9959 (July 27, 1953).[3] During hearings on H.R. 1055, other Representatives and the Dept. of Interior agreed to extend its reach to the entire United States, and Congress enacted P.L. 83-277 to make the provisions of the original bill "applicable generally." S. Rep. No. 722, 83rd Cong., 1st Sess. 1 (1953).

Public Law 83-277 provided for a new section, 18 U.S.C. § 1161, which lifted the prohibition against sale of liquor to Indians throughout the United States outside of Indian country, ***and*** affirmatively delegated authority to states and Indian tribes to regulate liquor sales within "Indian country." *See Rice*, 463 U.S. at 715 & n. 1. Public Law 83-277 expressly directed that § 1161 be codified "in chapter 53" of "title 18" after "section 1151." Title 18 U.S.C. § 1151 provides in pertinent part that

> 'Indian country,' as used in this chapter [53], means (a) all lands within the limits of any Indian reservation....

B. TRIBAL COURT PROCEEDINGS.

With the passage of the Indian Alcohol and Substance Abuse Prevention and Treatment Act, the Cheyenne River Sioux Tribe took Congress at its word and declared a war on alcohol abuse in 1987, setting a goal to be alcohol abuse free by the year 2000. In 1988, 150 Indian and non-Indian students petitioned Tribal Council to strictly enforce liquor laws. The Tribe

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3. Congress knew that Indian tribes faced severe problems of alcohol abuse, and viewed its delegation of authority to States and Indian tribes as important to permit local efforts to fight alcohol abuse. Rep. Patten testified, "the largest purchases of Sunmaid Raisins in the Southwest are at Indian trading posts.... and they take that and make raisin jack, some of it highly impure." Hearings on H.R. 1055 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, Report of Proceedings (March 18, 1953) ("House Hearings") at A-69.

requested all reservation liquor dealers to comply with liquor laws voluntarily. Several refused, so the Tribe filed suit.

The Tribe filed civil actions against petitioners in tribal court to enforce CRST Ordinance No. 1 ("Business License"), which requires payment of $100.00 to obtain a general business license, and CRST Ordinance No. 48 ("Alcoholic Beverage Control"), which requires payment of a $150.00 license fee to obtain a liquor license and establishes regulations for the sale of alcohol on the Reservation, including: days and hours of operation; prohibition on sales through "drive-up" windows; prohibition on sales to minors, intoxicated persons, etc.; and revenue measures for alcohol abuse prevention and treatment. Petitioners[4] argued they were exempt from tribal law because their bars and liquor stores were allegedly part of "non-Indian communities" on the Reservation, which, in their view insulates them from reasonable tribal regulation to permit them to sell liquor to tribal members and others with no accountability to the Tribe -- regardless of the admittedly severe damage their liquor sales cause to the Tribe and the Reservation population. The Cheyenne River Sioux Tribe Superior Court found evidence of

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4. Petitioners claim to be "non-Indian owners and operators of liquor establishments" Pet. 7, but this is not so clear. Generally, corporations have no "racial identity" at all. *See Village of Arlington Heights v. Metro. Housing. Dev. Auth.*, 429 U.S. 252, 263 (1977). However, in some circumstances, corporations can be deemed to share the racial or ethnic identities of their membership. *See, e.g., Sage v. Sicangu Oyate Ho, Inc.*, 473 N.W.2d 480, 483-484 (S.D. 1991) (South Dakota state-chartered corporation considered "Indian" for jurisdictional purposes). All of the petitioner municipalities have substantial percentages of Indian residents (from at least 27% to more than 50%), Pet. 9; O.Ap. 89-136, and the Legion Club has Indian members. ***Indeed, Dupree's and the Legion Club's liquor establishments were managed and owned, respectively, by tribal members throughout much of this litigation.*** Only Micki's Lounge is owned by a non-Indian individual, and she ***bought the Lounge she was formerly employed in from a tribal member only four years before this action commenced.***

the so-called "character" of petitioners' communities immaterial under *Rice*.

The superior court held a four-day trial to examine the scope of the Tribe's delegated authority, and to review petitioners' business dealings with tribal members to determine their extent and the effect of their liquor sales on the Tribe and the Reservation population.[5] In regard to petitioners' business dealings, the court found that petitioners:

> 1) "encourage tribal members to patronize their establishments, and ... choose their liquor inventories with a view toward the drinking patterns and preferences of tribal member[s];"
>
> 2) "make from 15 percent to 85 percent of their sales of alcohol to [tribal] members;" and
>
> 3) "draw customers not only from the immediate area in which they are located, but also from communities throughout the reservation, particularly on Sundays, [and] profit from the patronage of [tribal] members."

A-77, A-78. The superior court also found that petitioners all benefit from tribal government services, including police protection and judicial services. For example, tribal police conduct bar checks and routinely patrol near petitioners' establishments, and tribal members arrested at their liquor establishments are tried in tribal court. A-80.

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5. The superior court heard testimony from twenty-three witnesses, including several experts on alcohol abuse: Dr. Terrence Sloan, Director of the United States Indian Health Service Aberdeen Area, Dr. Theo Matheny, Clinical Director of the Cheyenne River IHS Hospital, Dr. Philip May, Director of the Center on Alcohol Abuse, Substance Abuse and Addictions of the University of New Mexico, and Prof. William Wolf, of the Western Behavioral Studies Institute, University of Colorado. The superior court also examined numerous studies on the negative effects of alcohol abuse among Indians, including several specific to Cheyenne River Reservation.

As to the grim effects petitioners' liquor sales have on the Tribe and its members, the court found:

> 1) "Alcohol leads to tremendous early loss of life, dysfunctional families, and high morbidity. Use of alcohol sold by [petitioners] is a causal factor in alcohol related deaths and injuries among tribal members;"
>
> 2) "Use of alcohol sold by [petitioners] has been a causal factor in drunk driving incidents on the reservation and alcohol-related property damage;"
>
> 3) "Child abuse and neglect are serious problems on the reservation and the use of alcohol sold by [petitioners] contributes to these problems."
>
> 4) "Use of alcoholic beverages sold by [petitioners] contributes to [fetal alcohol syndrome] and [fetal alcohol effect] in children of tribal members;"
>
> 5) Unemployment on the Reservation is 60% to 65%. Unemployed tribal members suffer from severe alcohol abuse, "spend their grocery money on alcohol," "sell whatever they have ... to purchase alcohol," and cash welfare checks at petitioners' bars and liquor stores.

A-79, A-83, A-84, A-85. Thus, the court found "problems of alcohol abuse are so pervasive that they threaten the very existence of the tribe" and petitioners "admittedly contribute to these problems." A-82.

These findings had ample support. For example, testimony was introduced from a federal criminal trial for vehicular homicide, where a young man was drinking in Micki's Lounge before killing another tribal member in a car accident. Tr. Exh. 15, *see also* II Tr. 86-90 (tribal member had a car accident on his way home after drinking at the Dupree Bar and was arrested for drunk driving). While the Tribe awaited the Eighth Circuit mandate, another tribal member died in a car accident stemming from liquor sales by Micki's Lounge and Timber Lake Package

Liquor to Indians who were intoxicated before the purchases. The driver, a tribal member, was sentenced for vehicular homicide as a result of his intoxication. *See* O.Ap. 370-381.

Experts recognized the strong correlation between the Tribe's war on alcohol abuse and actual prevention of alcohol abuse on the Reservation. Dr. Sloan noted that drunk driving deaths decreased after the Tribe began its regulatory effort. Prof. Wolf's studies found a 30% drop in high school children at risk for drug and alcohol abuse. At least part of these improvements stems from the Tribe's regulatory efforts. I Tr. 153 (Dr. Sloan), III Tr. 148 (Prof. Wolf). Dr. May explained:

> licensing and various alcohol-related policies ... can ... encourage norms of moderation and control over alcohol and drinking behavior while discouraging ... misuse.

The court found: "Licensing of liquor establishments plays an essential role in any scheme to control the availability of alcohol and regulate its use among tribal members." A-85.

Under its findings, the superior court ruled that the Tribe had delegated authority under 18 U.S.C. §§ 1151, 1161 and authority under both branches of the test for tribal authority set forth in *United States v. Montana*, 450 U.S. 545, 565-565 (1981) (tribal authority extends to persons who enter commercial relations with tribal members and to conduct which affects the tribe's "political integrity, economic security, or health and welfare"), to require petitioners to obtain tribal business and liquor licenses. A-91. The superior court ***enjoined*** petitioners from operating their businesses until they complied with the business and alcohol beverage control laws.[6]

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6. Petitioners applied for and received stays from the superior court based on their agreement to post appeal bonds. Petitioner Micki's Lounge later refused to post the bond and was temporarily closed and had its ($200.00) liquor inventory removed as contraband under court order until the bond was posted. After Micki's Lounge posted a bond, the business was allowed to re-open but it never applied for the return of its "inventory."

A-92. *Cheyenne River Sioux Tribe v. Isabel Package Liquor*, 18 Indian L. Rptr. 6709 (Chy.R.Sx. Sup.Ct. Jan. 8, 1991).

Petitioners appealed to the Tribe's Court of Appeals.[7] Petitioners waived review of the superior court's findings of fact by failing to challenge them in their appellate brief and chose only to contest its rulings of law. The court of appeals agreed with this Court's and the superior court's interpretation of 18 U.S.C. §§ 1151, 1161: Congress has delegated authority over liquor sales to tribes and states throughout Indian country. *Cheyenne River Sioux Tribe v. Dupree American Legion Club*, 19 Indian L. Rptr. 6097 (Chy.R.Sx.Ct.App., Apr. 2, 1992).

Although several petitioners utilize the tribal courts to collect their business debts from tribal members (and continued to do so up to and during the current action), III Tr. 35; O.Ap. 58, 77, 122, 197, they refused to comply with the tribal court's order in this case, so the superior court scheduled a show cause hearing to enforce its order. Just before the hearing, petitioners filed suit in federal district court to enjoin enforcement of the tribal court order.

C. FEDERAL ADMINISTRATIVE ACTIONS

In 1991, the Tribe amended Ordinance 48, "Alcoholic Beverage Control," and submitted it to the Secretary of the Interior for approval and publication in the Federal Register as required by § 1161. Ordinance 48 (1991), like its predecessor, applied throughout the Reservation. The U.S. Department of

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The remaining businesses were not closed "under threat of force" as petitioners state -- except to the extent that a court injunction carries (at some background level) a "threat of force."

7. ***The Tribe's Court of Appeals Justices included former Senator James Abourezk, past Chairman of the United States Senate Committee on Indian Affairs, and Prof. Frank Pommersheim of Univ. of South Dakota School of Law.***

the Interior, Office of the Solicitor undertook a detailed analysis[8] of §§ 1151, 1161 as interpreted by this Court in *United States v. Mazurie*, 419 U.S. 544 (1975), and *Rice*, and concluded that the Tribe's delegated authority extends throughout Indian country as defined by § 1151 and the Secretary of the Interior approved and published Ordinance 48 (1991). Petitioners sought no review of that decision. *See* 5 U.S.C. §§ 701-706.

D. FEDERAL COURT PROCEEDINGS.

In federal district court, petitioners alleged they were located in "non-Indian communities" and alleged that their liquor sales did not affect the "health and welfare, economic security, and political integrity" of the Tribe, but did not contest the accuracy of the tribal court findings of fact.

After calendaring and notifying the parties of a hearing, the district court preliminarily enjoined the Tribe without a hearing. The district court made no factual findings but noted:

The Court agrees that [the problems of crime,

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8. Petitioners' statement that the Secretary acted "virtually without analysis," Pet. 7, is belied by the detailed seven-page single-spaced legal analysis applied by the Associate Solicitor to the Tribe's Ordinance 48. Memorandum from the Acting Associate Solicitor, Indian Affairs, April 24, 1992. App. A, Exh. F, Defendants' Motion for Summary Judgment.

Petitioners' claim that the 1991 approval was an "abrupt[] alter[ation]" of Interior's position regarding § 1161 is unsupported by the materials they cite. The 1988 approval, Pet. 6 n. 4, notes that "my certification is not a decision on whether there are exemptions to the tribe's jurisdiction." *Id.* ***The 1951 Solicitor Opinion, which petitioners rely on, Pet. 4-5, dealt only with sales of beer to non-Indians and issued before § 1161 was enacted*** so it is not Interior's position on the § 1161 delegation to states and tribes.

The Secretary acted under congressional direction in approving the Tribe's Ordinance 48. Thus his decision to approve the Tribe's Ordinance 48 is governed by the rules of judicial deference to applicable administrative decision-making outlined in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

> automobile accidents, and fetal alcohol syndrome] exist on the tribe's reservation and that alcohol is a contributing factor.

A-18. The district court "refused to make a decision on the merits of this case," A-19, noting only that petitioners had a "colorable possibility" of success on the merits. A-21. The district court did not interpret §§ 1151 and 1161 or evaluate the "character" of petitioners' communities; suggesting instead that the legal question might be left open because, in the district court's view, *Rice* dealt only with state authority. A-21.

Thus, petitioners present this Court with a record which contains ***only*** the tribal superior court's unchallenged factual findings. Though petitioners had open-ended opportunities to submit written evidence, their only so-called "evidence," Pet. 8-9, is barely more than a handful of two-page affidavits which contain primarily conclusory statements of law with scant admissible factual support[9] -- many of those conclusory assertions were contradicted by petitioners' own admissions during subsequent discovery, which revealed that Isabel, Timber Lake and Dupree, *see supra* n. 9, are substantially "Indian" in character.[10] Indeed, in *Solem v. Bartlett*, 465 U.S. 463, 480

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9. Respondents, on the other hand, answering petitioners' arguments alternatively, filed an anticipated written "summary of evidence" for the district court hearing (which was never held) that, *inter alia*: (1) Dupree's population is mostly Indian; (2) 65% of Dupree's public school children are Indian; (3) Dupree receives city-wide telephone, garbage pick-up, sanitary landfill, and liquid propane gas service from tribal entities and tribal officers provide continual law enforcement services in Dupree; (4) the Tribe's Housing Authority maintains 50 houses for families and 18 elderly housing units in Dupree; and (5) 50% of Dupree American Legion and 85% of Dupree City Package Liquor customers are Indian. See also Tr. Exh. 10.

10. Petitioners' own admissions establish that public schools in Dupree (pop. approx 550), Timber Lake (pop. approx. 800), and Isabel (pop. approx. 400) have "a majority of," 43%, and 28% Indian students respectively. Isabel, with the lowest Indian population of petitioners' communities, Pet. 9, is about 27% Indian, *id.*, contains *two* tribal Housing

(1984), this Court found that, "*it is impossible to say that the opened areas of the Cheyenne River Sioux Reservation have lost their Indian character.*" (emphasis added).[11]

Respondents appealed the preliminary injunction, arguing that § 1161 as interpreted in *Rice, supra* foreclosed petitioners' claims.[12] The Eighth Circuit followed *Rice*, reversed the

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Authority complexes (twenty-nine units), has tribally- and individually-owned trust land within its municipal limits, and receives city-wide telephone service from a tribal corporation. *See, generally*, O.Ap. 227-239. Moreover, the U.S. Census Bureau estimates that its figures on Indian population are about 12% below actual Indian population, and petitioners' own expert admitted that there is at least a 5% to 6% undercount of the Indian population on the Cheyenne River Reservation.

11. Discovery conducted during the pendency of the appeal also confirmed the need to regulate petitioners' liquor selling practices. ***Dupree sells alcohol through a drive-up window***, which is prohibited by tribal law, and Dupree's mayor testified that customers drink in their cars. O.Ap. 325. Dupree admitted that its "practice of selling alcoholic beverages to persons in automobiles makes it more likely that the package liquor store will make sales to intoxicated persons, including Indians . . . because sales personnel do not have the opportunity to observe the customers walking." ***The Legion Club admittedly "sold alcoholic beverages to visibly intoxicated Indians....***" O.Ap. 193. The Legion Club manager, a tribal member, serves Indians that are too intoxicated to continue drinking, o.ap. 331, and her customers have "driven away" intoxicated. Mary Kraft of Timber Lake city package liquor store, knew "***Indian people ... have had their lives ruined [by alcohol] who have purchased liquor from the City Package Liquor.***" O.Ap. 320-321. ***Micki's Lounge sells liquor to pregnant Indian women until they are so intoxicated that they must be "cut off."*** O.Ap. 339-340.

12. Respondents also argued that: (1) the tribal court findings of fact establish tribal authority under *Montana*'s "consensual relations" and "health and welfare" tests; (2) claims against the Tribe *eo nomine* are barred by sovereign immunity; (3) the district court erred in its conception of "irreparable harm" and the "public interest;" (4) the district court erred by taking judicial notice of *untrue* facts; and (5) the district court should have given respondents a hearing to object to petitioners' motion.

preliminary injunction, and ordered dismissal of petitioners' alcohol beverage control and business license ordinance claims. A-10. The court below did not reach the other grounds for reversal. *See supra* n. 12. A-8.

Upon receiving the Eighth Circuit's mandate, petitioners applied for tribal alcohol beverage and business licenses. The business licenses were granted upon application and the alcohol beverage licenses were granted with the understanding that petitioners would cease their sales through drive-up windows, sales to intoxicated people, etc., in accordance with tribal law. Petitioners seek review of the Eighth Circuit's decision on their alcoholic beverage control ordinance claim and drop their attack on the business license ordinance.[13]

SUMMARY OF ARGUMENT

The Eighth Circuit's decision is a wholly unremarkable application of law already settled by this Court. Petitioners argue that *some* conflict "in principle" exists with prior rulings, but the Eighth Circuit based its decision on this Court's ruling in *Rice v. Rehner*, 463 U.S. 713, 715 & n. 1 (1983). In *Rice*, this Court held that under 18 U.S.C. § 1161, "Congress has delegated authority to states as well as to Indian tribes to regulate the use and distribution of alcoholic beverages in Indian country." 463 U.S. at 715 & n. 1 (applying § 1151's definition of "Indian country," which includes "all lands within a

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13. Petitioners confine their arguments to alcohol control matters and challenge regulation directed only at the "sale of liquor." Pet. QUESTION PRESENTED. Moreover, this Court and the circuits agree that tribes can require compliance with general business licensing laws such as C.R.S.T. Ord. 1. *South Dakota v. Bourland*, 113 S.Ct. 2309, 2321 (1993) (tribe may regulate non-Indians who "enter consensual relations" with members); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985); *FMC v. Shoshone Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991); *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

reservation").

The *Rice* Court's ruling was correct and required by the express texts of 18 U.S.C. § 1151 and P.L. 83-277 (of which § 1161 is one part) and that construction of "§§ 1151, 1161" is settled law, which the Court has relied on in other cases. So, Supreme Court review is unwarranted in this case, especially since Congress affirmed the *Rice* Court's statutory construction the following year by amending § 1161 without changing its operative statutory language in 1984. *Accord* Pet. 28 n. 18.

Petitioners' argument boils down to the proposition that Congress' delegation of authority in § 1161 is not governed by § 1151's definition of "Indian country" since § 1161 is a mere exemption from federal criminal offenses set forth in §§ 1154 and 1156. This Court already rejected that argument, first in *Mazurie*, and then in *Rice*. Petitioners' peripheral arguments (which curiously rely on statements in briefs in prior cases rather than court opinions) also were rejected in *Rice* or other decisions of this Court and, in many cases, were waived below.

Because the Eighth Circuit decision is based on *Rice*, there is no conflict with any other circuit. Indeed, there has been virtually no litigation concerning tribal authority to regulate liquor sales in Indian country since *Rice*. Here, the Eighth Circuit simply reviewed a prior decision to follow *Rice*. Any purely intra-circuit concern about prior Eighth Circuit case law was resolved when rehearing *en banc* was denied.

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT SIMPLY APPLIED *RICE*, AND REJECTED ARGUMENTS REJECTED BY THIS COURT IN *RICE* AND OTHER CASES.

The Eighth Circuit's decision does not conflict with any decision of this Court. Petitioners contend there is a "conflict in principle" with prior rulings, but in fact, the Eighth Circuit's decision was based on law settled by this Court in *Rice, supra*.

A. The *Rice* Court Held: Congress "Delegated Authority To States As Well As To Indian Tribes To Regulate ... Alcoholic Beverages In Indian Country."

In *Rice*, this Court undertook exhaustive analysis of 18 U.S.C. § 1161 and held that:

> Congress has delegated authority to the States ***as well as to the Indian tribes*** to regulate the use and distribution of alcoholic beverages in ***Indian country***.

Rice at 715 (emphasis added). This Court described the delegation's scope by ***quoting § 1151***, "Indian country":

> ***means (a) all land within the limits of any Indian reservation*** ... notwithstanding the issuance of any patent....

Rice at 715 n. 1 (emphasis added).[14] The court below simply followed *Rice,* concluding that "the geographic scope of state and tribal authority extends to a reservation's four corners." *City of Timber Lake, et al. v. Cheyenne River Sioux Tribe, et al.*, 10 F.3d 554, 558 (8th Cir. 1993); A-7.

Petitioners ***now*** argue that the ruling in *Rice* with respect to the delegation to tribes was "dicta" (and not even "considered" dicta). Pet. 21.[15] On the contrary, the *Rice* Court's ruling that

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14. The *Rice* Court meant what it said about the scope of the delegation -- it extends to the reservation boundaries. The *Rice* opinion never mentions the character of Rehner's community nor the title status of her land. Petitioners rely on extra-record material to suggest that there may be no non-Indian communities on the Pala Reservation, as if that mattered, Pet. 20-21, but a map of that area shows that the entire Pala Reservation may be within a non-Indian community -- Escondido, CA!

15. When queried by the court below, petitioners expressly waived the point:

> THE COURT: "By enacting Section 1161, Congress intended to delegate a portion of its authority to the tribes as well as to the State...." Are you saying that's dictum?

Congress delegated authority to tribes was the *ratio decidendi* for finding the same delegation to States:

> Since we found this delegation [to tribes] ... we would ignore the plain language of the statute if we failed to find this same delegation in favor of the States.

463 U.S. at 730. Later opinions confirm that *Rice*'s finding that Congress delegated authority to Indian tribes is a "considered" decision and part of settled law. *See, e.g., National Farmers Union v. Crow Tribe*, 471 U.S. 845, 852 n. 12 (1985) ("in recent years we have decided whether a tribe has the power to regulate the sale of liquor on a reservation. *Rice v. Rehner*").

Indeed, a plurality of this Court since recognized §§ 1151 and 1161 as the very paradigm of congressionally delegated authority in Indian country. In *Brendale v. Confederated Tribes*, 492 U.S. 408 (1989), this Court considered whether the Yakima Indian Nation had authority to zone non-Indian fee patent land in an "open" area of the reservation (immediately outside Yakima, Washington, 1990 pop. 52,827). In its analysis, Justice White's plurality opinion (joined by Rehnquist, C.J., Scalia and Kennedy, JJ.) suggested that absent "express congressional delegation," the Yakima Nation was divested of that general authority. Then, the plurality pointedly distinguished zoning as an area where there is no delegated

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> PETITIONER'S COUNSEL: I'm not saying that's dicta, Your Honor. I don't think we've ever -- well, we may have said that at one point in time; I'm not going to say that.

Tr. of Oral Argument, May 12, 1993 ("Oral Argument") at 21. ***Even in the petition, they admit that § 1151 "was and remains the basic definition of 'Indian country'... applicable to the Pala Reservation in Rice."*** Pet. 20. In P.L. 83-277, Congress enacted a rule of national application, and just as § 1151 applied to the Pala Reservation in *Rice*, it applies to the Cheyenne River Reservation here. Accordingly, the petitioners are left only to complain that the *Rice* Court's holding, with its application of § 1151, cannot be considered authoritative because it was not italicized! Pet. 21.

authority from the paradigmatic express congressional delegations of authority -- liquor and environmental regulation. In those areas, the plurality explained that Congress has "***expressly delegated***" authority to Indian tribes by referring to "18 U.S.C. §§ ***1151, 1161***; 33 U.S.C. § 1377(e) and (h)(1)." (Emphasis added).[16] Thus, the *Brendale* plurality consciously acknowledged the *Rice* Court's reading of §§ 1151 and 1161 as settled law.

B. This Court Already Rejected the Same Arguments Which Petitioners Raise Here in *Rice* and *Mazurie*.

Rice followed from this Court's prior ruling in *Mazurie*, 419 U.S. 544 (1975). *Mazurie* was a federal criminal prosecution for introduction of liquor into Indian country which naturally was governed by the geographic terms in the statute defining the federal criminal offense: 18 U.S.C. § 1154. The *Mazurie* Court emphasized that Congress, by enacting 18 U.S.C. § 1161, had ***both***: ended the distinct federal prohibitions on introduction of liquor and the broader prohibition on sale of liquor to Indians; ***and*** affirmatively delegated authority to Indian tribes to regulate the sale of alcoholic beverages in Indian country. *Mazurie* at 553-556. What is at issue here is Congress' affirmative delegation to tribes under § 1161, not residual federal criminal authority set forth in § 1154.

Petitioners argue that statements from briefs of parties and amici in *Mazurie* show that Congress' delegation of authority to States and Indian tribes is limited by the terms of the criminal offense defined in 18 U.S.C. § 1154(c).[17] This argument is

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16. Despite the *Brendale* plurality's clear reference to "§§ 1151, 1161" as an express delegation of authority to Indian tribes, petitioners have themselves attested to the fatal weakness of their case by misguided reliance on *Brendale* to support a contrary proposition. Pet. at 22 & n. 15, 24-25.

17. If the Court were to look to briefs for authority, arguments in *Rice* are more indicative of civil regulatory authority intended by § 1161. In *Rice*, California told this Court to reject an argument that states' and tribes'

based on their claim that § 1161 "is not an 'express congressional delegation' of power," Pet. at 25, but the claim that § 1161 is a "mere exemption" from criminal liability -- ***which is the sole basis of petitioners' case*** -- was already rejected by this Court:

> Both Rehner and the court below believed that § 1161 was merely an exemption from *federal* criminal liability. ... Our decision in *Mazurie, supra* rejected this argument with respect to Indian tribes.... In *Mazurie* we held that Congress intended to delegate a portion of its authority over liquor transactions on reservations.[18]

Rice, at 730 (emphasis in original) (citation omitted). *Id.* at 734 n. 18 (distinguishing between "the reach of *federal criminal jurisdiction*" and "the scope of state [delegated] jurisdiction" (emphasis in original)).[19]

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delegated authorities varied in checkerboard fashion because this result: "fragments the matter.... It is much more reasonable to conclude that Congress intended joint control by both states and tribes than partial control by each.... Congress was well aware that a comprehensive system was required." Petitioners' Brief on the Merits, *Rice v. Rehner*, No. 82-401 at 58, 65.

18. Indeed, in the portion of its opinion which addresses the delegation to tribes, the *Mazurie* Court identified § 1151 and "Congress' authority to define 'Indian country' so broadly." *Mazurie* at 555. The Court gave special attention to the principles in *Seymour v. Superintendent*, 368 U.S. 351 (1962), which refused to ascribe to Congress an intent to create "an impractical pattern of checkerboard jurisdiction." *Id.*

19. Again in *Rice*, this Court characterized *Mazurie* as holding that Congress intended its own "absolute but not exclusive ***power*** to regulate Indian liquor transactions would be delegated to the tribes themselves." *Rice* at 728 (emphasis added). Of course, Congress' "power" over Indian liquor transactions extends throughout Indian country and is unconnected to any exemptions found in particular criminal statutes.

C. Congress Affirmed *Rice* By Amending § 1161 Without Changing Its Operative Language In 1984.

As petitioners themselves note, it is settled that "when Congress amends certain sections of an Act but leaves others unamended, the prior construction of the statute ***by this Court*** 'which has been left untouched' must be considered" authoritative. Pet. 28 n. 18 (emphasis added) (citing *Reed v. Steamship Yaka*, 373 U.S. 410, 414 (1963) (this principle can outweigh even "the wording of the statute")). Petitioners even concede the application of this rule to § 1161, Pet. 28 n. 18, which Congress amended (while leaving the operative language "untouched") after it was interpreted by this Court. P.L. 98-473, Title II, ch. II, § 223(b), 98 Stat. 2028. Of course, when Congress amended § 1161 in ***1984***, it thereby affirmed this Court's recent construction of the statute in *Rice*, ... (***1983***). (Not, as petitioners would have it, lower court rulings which preceded, and are not consistent with, this Court's ruling in *Rice*.) *After Congress affirms this Court's construction of a statute, further review on the point is plainly unwarranted.*

II. PETITIONERS' INVITATION FOR THE COURT TO REVISIT *RICE* IS FRIVOLOUS: *RICE* WAS SOUND STATUTORY ANALYSIS.

This Court completely analyzed Congress' delegation of authority, 18 U.S.C. §§ 1151, 1161, in *Rice* so further review is not necessary or warranted.

A. Statutory Text Shows That "Indian Country" As Used in § 1161 Is Defined By § 1151.

Petitioners' statutory construction arguments contradict the express language of 18 U.S.C. § 1151 and Pub. L. No. 83-277, one portion of which is codified at § 1161. § 1151 states that:

> Except as otherwise provided in sections 1154 and 1156 of this title, ***the term "Indian country," as used in this chapter***, means (a) all land within the limits of any Indian reservation,... notwithstanding the issuance of

> any patent.... (Emphasis added)

Then, Public Law 83-277 provides, in pertinent part, that:

> Chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding ***section 1151 of such title*** the following new item: 1161.... Title 18 ... is hereby further amended by inserting in ***chapter 53*** thereof immediately after section 1160 a new section ... section 1161.... (Emphasis added)

These texts show that Congress understood that it was placing § 1161 in chapter 53,[20] with "Indian country" defined by § 1151. Rep. D'Ewart explained: "***Indian country is defined as within the boundaries of Indian reservations....***" House Hearings, A-24 (emphasis added). This consistent statutory framework is reflected in both §§ 1154 and 1156 (from which petitioners struggle to fashion a narrow delegation), which each restrict their limited, particular definition of "Indian country" for "use[] in this section...." Thus, the court below found that:

> By the express terms of §§ 1154(c), 1156, and 1151, the narrow definition of Indian country contained in §§ 1154(c) and 1156 applies only to the reach of those federal criminal liability statutes, and the broad definition of § 1151 applies to all other sections in the chapter, like § 1161.

City of Timber Lake, 10 F.3d at 558, A-7.

Indeed, rules of statutory construction also require this result. Where, as in § 1151, there is "an express exception" in a statute, it negates the implication of other exceptions. *See Chicago v. Environmental Defense Fund*, 62 U.S.L.W. 4283

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20. Petitioners simply ignore P.L. 83-277's reference to § 1151 because it undercuts their argument that § 1151 does not apply to the § 1161 delegation of authority.

(May 2, 1994). *See also* 2A SUTHERLAND'S STATUTORY CONSTRUCTION, § 7.11 (1991 ed.) at 165 (express exceptions "comprise[] the only limitation on the operation of the statute and no other exceptions will be implied"). By creating express exceptions to the application of § 1151 for federal criminal offenses, Congress made clear that § 1151's geographic terms defined "Indian country" in ***all other sections in the chapter, including the delegation of authority contained in § 1161***.[21]

Petitioners debate the logic of Congress' statutory framework, Pet. 17-19, but they never question the textual path that led this Court, and then the Eighth Circuit, to conclude that § 1161's delegation of authority in "Indian country" is governed by § 1151's definition.[22] Rather, petitioners complain that the decision below "creates an inexplicable gap" because tribal civil regulatory laws apply where § 1154's federal criminal penalties for "introducing" liquor may not. Pet. 17-19. Yet, there is

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21. Indeed, petitioners' insistence that § 1161's reference to the federal criminal statutes necessarily carries forward their geographic limitations into the delegation of authority in § 1161 would render the reference in § 1161 to "outside Indian country" superfluous because "outside Indian country," there are only fee lands and "non-Indian communities." Thus, petitioners violate the elementary rule that "a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1015 (1992).

22. In the face of *Rice* and contrary statutory text, petitioners try to renew "statutory construction" arguments in this Court, Pet. 27-28, but this Court's decisions and the statutory texts are the authoritative determinants of congressional intent. Petitioners' suggestion, Pet. 27, that statutes of the "same subject matter" should be read together is a rule of last resort. *See* 2B SUTHERLANDS' STATUTORY CONSTRUCTION, § 51.01 (1991 ed.) at 118 (rule not normally used "until all other means of determining the intent of the legislature have been exhausted"). Petitioners' other purported "rule," that "specific" provisions govern "general," Pet. 27-28, is used by courts to determine which statute applies to a given factual situation, not to countermand express statutory provisions like § 1151 and P.L. 83-277.

nothing inexplicable about congressional action lifting several distinct statutory prohibitions on sales of liquor to Indians -- which applied without regard to land status[23] -- while delegating to states and Indian tribes meaningful, comprehensive civil regulatory authority throughout § 1151 Indian country. As the Eighth Circuit noted, the texts of Public Law 83-277, §§ 1151, 1154 and 1156 all reflect Congress' intention to do so in neat symmetry and require the conclusion that Public Law 83-277's delegation of authority is governed by § 1151. Thus, since the statutory texts require that result, there is nothing "inexplicable" about the decision below or this Court's holding in *Rice*.

B. The Legislative History Of § 1161 Shows Congress Intended To Delegate Authority to Indian Tribes To Control Liquor Sales Within Their "Reservations."

This Court already undertook an exhaustive analysis of the legislative history of P.L. 83-277 in *Rice*, which shows that Congress meant the geographic scope of its delegation to Indian tribes to include "Indian country" as defined by § 1151.

Public Law 83-277, as originally introduced, covered only Arizona, whose constitution outlawed the sale of liquor to any Indian anywhere in Arizona, without regard to the ownership status of the land. House Hearings at A-4 to A-7.[24] In

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23. For example, the Constitutions of both Arizona and New Mexico were required to include prohibitions on liquor sales to Indians throughout the States, regardless of where that was done. *Rice* at 723. As for the national prohibition on sales to Indians, Felix Cohen told the House Committee that prohibition on the "the sale or giving away of liquor ... to any Indians ... regardless of the place where that is done [is] the most important part of the current discrimination." House Hearings at A-44. *See also Rice* at 722 (total national prohibition against sales to Indians continued until Public Law 83-277); *Id.* at 740 (Blackmun, dissenting) (same).

24. That P.L. 83-277 had its genesis in Arizona, where federally-mandated portions of the state constitution barred all liquor sales to any Indian anywhere in the state, disproves petitioners' suggestion that Congress

committee hearings, Commissioner of Indian Affairs Dillon Myer suggested that the bill be expanded to lift the prohibition on the sale of alcohol to Indians nationally and explained the insertion of references to §§ 1154 and 1156 in P.L. 83-277:

> We are ... in agreement that the statutes relating to intoxicating liquors in Indian country should be eliminated as discriminatory. This bill, unfortunately, does not cover all the statutes, so that our redraft would include these two [§§ 1154 and 1156].

Id. at A-15. Commissioner Myer, however, made no reference to the geographic terms of §§ 1154 and 1156 when discussing H.R. 1055. Rather, Commissioner Myer explained:

> this report is intended to eliminate all of the sections in the statutes which discriminate against Indians ... and at the same time provide opportunity for the *tribes to have prohibition on the reservation* if they wish to....

Id. at A-27 - A-28 (emphasis added). Congress' understanding that it addressed entire reservations was confirmed by Rep. D'Ewart:

> It says, 'shall not apply within any area that is not Indian country.'
>
> You know ***Indian country is defined as within the boundaries of reservations***....

Id. at A-24 (emphasis added). These statements confirm what the statutory texts already show: that Congress,[25] when

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concentrated on a "non-Indian community" exemption when it enacted P.L. 83-277. The "non-Indian community" idea was meaningless in Arizona in 1953 and was not Congress' focus in P.L. 83-277.

25. At one point, petitioners go so far as to assert that the 1953 Congress' "assimilationist" views favor a crabbed reading of tribal authority, statutory language notwithstanding. Pet. 19. This Court long ago rejected that argument. The ***very footnote which petitioners cite*** continues:

enacting P.L. 83-277, intended to delegate regulatory power to states and tribes with respect to Indian country, as generally defined by § 1151 to include entire reservations.

III. PETITIONERS WAIVED ANY CLAIM THAT TRIBAL COURTS CANNOT APPLY TRIBAL LAWS.

Petitioners ***now*** argue that *Mazurie* bars tribal courts from applying tribal liquor laws, Pet. 15, but they never before raised that issue, so it is not before the Court. *E.E.O.C. v. F.L.R.A.*, *supra* at 24; *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 244-245 (1985). As the court below found: "[petitioners] do not assert that any federal law has curtailed the tribe's power to assert [tribal court] jurisdiction." *City of Timber Lake* at 559. A-10.[26] *Cf. Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) (failure to allege and prove statutory limit on tribal court jurisdiction bars reconsideration by federal court of issues litigated in tribal court). Petitioners even argued below that the case be ***remanded to tribal court*** to apply their view of § 1161:

> PETITIONERS' COUNSEL: There is no decision of the tribal court deciding whether or not these are non-Indian communities.... [T]hat wouldn't stop the tribe from starting another enforcement proceeding in tribal court, which they certainly could do.... [W]e'd go through the exercise again....

Oral Argument at 20, 27-28. Of course, petitioners have used the tribal courts in the past to redress their grievances, and

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"That Congress intended to facilitate assimilation ... does not necessarily mean that it intended ... to terminate tribal self-government." *Washington v. Confederated Bands and Tribes*, 439 U.S. 463, 488 n. 32 (1979); *see Bryan v. Itasca County*, 426 U.S. 373, 388 (1976).

26. Petitioners did assert that tribal court jurisdiction over them was barred by ***tribal*** law. The court below rejected this argument and petitioners do not renew it.

continued to do so to collect business debts against tribal members, even while this action was pending in federal court.

Petitioners look for support in *Duro v. Reina*, 495 U.S. 676, 694 (1990). Pet. 15-16. Yet, *Duro* cannot support their claim because that case involved tribal ***criminal*** authority and while this Court noted that §§ 1151 and 1161 did not authorize ***criminal*** prosecution of non-members in tribal court, *id.*, it immediately acknowledged:

> our decisions recognize broader retained tribal powers outside the criminal context. Tribal Courts, for example, resolve civil disputes involving non-members, including non-Indians.

110 S.Ct. at 2061. Statements about tribal criminal authority in *Duro* provide no support for a limitation on tribal civil court authority. *National Farmers Union*, 471 U.S. at 855-856 (distinguishing tribal civil court from criminal court authority).

This Court has held that "[c]ivil jurisdiction over activities of [non-Indians on reservation land] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute," *Iowa Mutual*, 480 U.S. at 18. Congress, in the Indian Tribal Justice Act, P.L. 103-176, acknowledged that rule. H. Rep. 103-205, 103d Cong. 1st Sess. at 8-9, *reprinted in* 11A U.S.C.C.A.N. (Jan. 1994 Supp.) at 2429. Since petitioners identify no express statutory limit on tribal court jurisdiction, tribal courts possess authority to enforce tribal liquor laws in civil cases.[27]

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27. None of the lower court decisions which petitioners cite contains any limitation on tribes' ability to enforce their ordinances in tribal court. Indeed, petitioners cite *United States v. Morgan*, 614 F.2d 166 (8th Cir. 1980), which read *Mazurie* to hold that "[i]t has already been decided that ... the authority of a tribal court can extend over non-Indians insofar as concerns their transactions on a reservation with Indians. *Mazurie* at 557-58."

IV. THE EIGHTH CIRCUIT'S REVIEW OF A PRIOR CIRCUIT DECISION, IN ORDER TO CONFORM TO AN INTERVENING DECISION BY THIS COURT, CREATES NO BASIS FOR CERTIORARI.

No decision from any other circuit (or any state high court) conflicts with the decision below. The clear rule settled by *Rice* in 1983, and affirmed by Congress in 1984, has engendered virtually no litigation. The Eighth Circuit reviewed its prior holding in *Morgan*, *supra* to follow the *Rice* Court's direction, and there have been no decisions in eleven years since *Rice* to suggest that tribal authority over liquor sales is limited within Indian country. Indeed, *Morgan* is the only case since P.L. 83-277's enactment in which any federal court ever found non-Indians exempt from tribal liquor laws. Concerns about *Morgan* are strictly intra-circuit and were resolved by denial of petitioner's request for rehearing *en banc*.

V. PETITIONERS' "LIQUOR TRANSPORT" ARGUMENT IS NOT BEFORE THE COURT.

Petitioners are not liquor transporters and concede that liquor transport is not at issue here: "this litigation only explicitly raises the issue of tribal jurisdiction of non-Indian communities." Pet. 3 n. 1. In fact, petitioners' Complaint includes no reference, and the record contains no evidence, of liquor transport or its actual regulation by respondents. Even the list of highways purportedly within Indian reservations, Pet. 29, is extra-record. Yet, petitioners would still make much of liquor transport -- even referring to it in their "Question Presented." Pet. QUESTION PRESENTED; Pet. 28-30. Even so, they only assert that the decision below "arguably" leads to liquor transport and term the so-called problem only "potential." Pet. 28-29. Clearly, this issue is not ripe for review.

Moreover, petitioners failed to preserve their transport argument for this Court. It first surfaced on petition for rehearing in the court of appeals, which is inadequate to preserve a contention. *Anderson v. Beatrice Foods Co.*, 900

F.2d 388, 396-397 (1st Cir. 1990); *Browning v. Navarro*, 894 F.2d 99, 100 (5th Cir. 1990); *United States v. Lewis*, 798 F.2d 1250 (9th Cir. 1986).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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